



734

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Emory A. Spencer
County Attorney
Aransas County
Rockport, Texas

Dear Sir:

Opinion No. O-2965

Re: whether a sheriff may be
elected at a special elec-
tion under the described
facts.

Your letter of December 9, 1940, recites facts and
seeks our opinion, as follows:

"I respectfully request your opinion on the
following matter. The sheriff of Aransas County
died on the 7th day of December 1940. He had
been re-elected to the office for 1941-1942 at
the General Election held on November 5, 1940.
The Commissioners Court, acting under Article 2355
H. C. S. 1925, appointed Hattie Brundrett, wife
of former sheriff, J. A. Brundrett, to fill the
unexpired term, which term expires on December
31, 1940. Now, due to a number of causes, a major-
ity of the people as well as a majority of the
members of the Commissioners Court, if legal,
would like to have an election for the purpose
of electing a sheriff for the term, 1941-1942.
It is my opinion that such an election would be
legal only in the case that Article 2355 is direc-
tory. In view of the foregoing, my question is
this:

"1. Is Article 2355 H. C. S. mandatory or
directory?

"2. If Article 2355 is directory, then under
what circumstances could an election be held for
the purpose of electing a sheriff for the term
1941-1942 so that said election would be legal?"

Honorable Emory L. Spencer, Page 2

Section 23 of Article V of the Constitution of Texas provides:

"There shall be elected by the qualified voters of each county a sheriff, who shall hold office for a term of two years, whose duties, and perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners' Court until the next general election for county or state officers."

This constitutional command to the commissioners' court to fill vacancies in the office of sheriff is embodied in Article 2355, Revised Civil Statutes, which reads:

"The Court shall have power to fill vacancies in the office of: County Judge, County Clerk, Sheriff, County Attorney, County Treasurer, County Surveyor, County Hide Inspector, Assessor of Taxes, Collector of Taxes, Justices of the Peace, Constables, and County Superintendent of Public Instruction. Such vacancies shall be filled by a majority vote of the members of said Court, present and voting, and the person chosen shall hold office until the next general election."

That a vacancy will exist in the office of sheriff of Aransas County on January 1, 1941, is established under the cases of State v. Cocks, 54 Tex. 482; Maddox v. York, 54 S.W. 24; 93 Tex. 275; and Dobkins v. State, 17 S.W. (2d) 81, 19 S.W. (2d) 574.

In the Maddox case, affirmed by the Supreme Court, the Court of Civil Appeals declared:

"But as the sheriff-elect was entitled, upon qualifying, to hold the office for a term of two years, whatever prevented him from doing so created a constructive or virtual vacancy in office for his entire term, which was as effectual, under the Constitution, as a literal vacancy would have been, had he died after qualifying and taking possession of the office."

The Dobkins case involved the death of the sheriff-elect on December 12, 1928, after the general election and before the commencement of the term to which he was elected.

In two opinions by the Fort Worth Court of Civil Appeals it was held that a vacancy existed in the office on January 1, 1929, Judge Connor saying in the second opinion:

Honorable Emory L. Spencer, Page 3

"The opinion (the prior opinion by the same court) expressed the conclusion, which we yet retain, that the vacancy existed in the office of sheriff for the term beginning January 1, 1929, which the commissioners' court was authorized to fill. . . . Such conclusion has been strengthened by a reconsideration of the cases of *State v. Cooke*, 54 Tex. 482, and *Maddox v. York*, 21 Tex. Civ. App. 622, 54 S.W. 24, and by the language of the Supreme Court in disposing of the certificate of dissent presented in the latter case. See *Maddox v. York*, 95 Tex. 275, 55 S.W. 1133."

Section 23 of Article V of the Constitution and Article 2355 of the Revised Civil Statutes manifestly contemplate that the commissioners' court itself shall fill a vacancy in the office of sheriff. Moreover, there is no constitutional or statutory provision for or authorization of a special election in such instance.

Article 2953a, Vernon's Annotated Civil Statutes (Acts 1933, 43rd Leg., p. 3, Ch. 3) purports to provide for special elections and Section 3 of the Act, were it made applicable to the office of sheriff and otherwise valid in relation thereto, expressly describes the situation before us.

There is, however, an entire omission in the Act. Section 1 commences "where special elections are authorized by this Act," but we search in vain among its provisions for any special election which it authorizes. Section 2 says, "where vacancies which are to be filled by election occur in a civil office" -- Section 3 says, "where an officer, holding an office the vacancy of which is to be filled by election" -- and thus throughout the Act.

It is, therefore, sufficient to say, whatever the effect of Article 2953a, that it cannot apply to the office of sheriff because it is not one "the vacancy of which is to be filled by election."

In *Williams v. Glover*, 259 S.W. 957, 960, it was declared:

"There is, however, no inherent right in the people, whether of the State or of some particular subdivision thereof, to hold an election for any purpose. Such action must be on authority conferred by law. 9 R.C.L., p. 989, § 12."

It was said in *Countz v. Mitchell*, 38 S.W. (2d) 770, 774, (Comm. of App.):

Honorable Emory M. Spencer, Page 4

"It is immaterial that there was a full and fair expression of the voters of the proposed district, as there can be no valid election if the same has not been called by lawful authority. The rule on this question is thus stated in Cye. vol. 15, p. 317: 'There can be no valid election without some lawful authority behind it. The right to hold an election cannot exist or be lawfully exercised without express grant of power by the Constitution or Legislature.'"

And in *Stephens v. Dedda*, 243 S.W. 710, 712:

"If, however, the trustees make an order for an election not authorized by the Constitution and laws and for a purpose not recognized by the law as within their power, it was simply a nullity."

You are, therefore respectfully advised that there is no authority in law for the commissioners' court of Aransas County to call a special election to fill the vacancy in the office of sheriff of such county which will exist on the 1st day of January, 1941. The vacancy in such office must be filled pursuant to Section 23 of Article V of the Constitution and Article 2355 of the Revised Civil Statutes.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Zellie C. Steakley*
Zellie C. Steakley
Assistant

ZCS:db

APPROVED DEC 18, 1940

Gerald B. Mann
ATTORNEY GENERAL OF TEXAS

